

INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
v.	:	
	:	
ANDREW PADILLA	:	NO. 95-174-1

MEMORANDUM AND ORDER

NORMAN SHAPIRO, J.

SEPTEMBER 12, 1997

Defendant moves under 28 U.S.C. § 2255 to vacate, set aside or correct sentence. He was indicted in April, 1995, with co-defendants, on four counts of drug law violation:

Count One, conspiring to distribute more than 500 grams of cocaine, in violation of Title 21, U.S.C. § 846(a)(1); Count Two, possession with intent to distribute and aiding and abetting possession with intent to distribute more than 500 grams of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, U.S.C. § 841(a)(1) and Title 18, U.S.C. § 2; Count Three, knowing and intentional possession with intent to distribute a mixture or substance containing a detectable amount of marijuana in violation of Title 21, U.S.C. § 841(a)(1); Count Four, knowing possession of a firearm in violation of Title 18, U.S.C. § 924(c); and Count Five, forfeiture of property used in the commission of drug offenses in violation of Title 21, U.S.C. § 853(a)(1), (2) and (p).

On June 27, 1995, defendant entered a plea of guilty to Counts I, II and V; he was sentenced on September 19, 1996. At Offense Level 29 and Criminal History Category II, the

Sentencing Guidelines provided for imprisonment for 97-121 months. Pursuant to his Plea Agreement, the court granted the government's motion for a downward departure under Section 5K1.1 of the Sentencing Guidelines for substantial assistance in the investigation and prosecution of other persons. Padilla was sentenced to 48 months imprisonment on Counts 1 and 2 (concurrent) with a fine of \$5,000 and a special assessment of \$100.

Padilla claims counsel was ineffective for failing to object and seek an evidentiary hearing based on the court's reliance on erroneous information in sentencing him. The calculation of the Sentencing Guidelines included a two-point enhancement for a weapon attributed to defendant. The weapon was in the possession of co-defendant, Francisco Collazo, at the time of Padilla's arrest. Count 4 of the Indictment charged only defendant Collazo with knowingly possessing a firearm.

At the change of plea colloquy, petitioner had admitted knowing his co-defendant possessed a firearm. At the sentencing hearing, Padilla's counsel contended that Padilla had no knowledge of the presence of a firearm and objected to the two-point weapon enhancement. The court provided Padilla with the opportunity to discuss this matter with counsel and withdraw his guilty plea if the facts she had previously sworn to were not correct. Padilla chose to withdraw the objection and proceed to sentencing. Counsel was not ineffective for failing to argue with the court about this matter. In any event, the Government's motion under U.S.S.G. § 5K1.1 gave the court the discretion to go below the guidelines, and it did. The downward departure reduced the sentence imposed to 50% of the minimum otherwise required.

The court clearly understood that the weapon did not belong to Padilla and had not been used by him or his co-defendant in committing the offense. Padilla was neither convicted nor

sentenced for knowing possession of a weapon. Padilla's admitted knowledge of Collazo's possession of the weapon during the drug transaction was appropriate for consideration at sentencing.

Padilla expressly admitted under oath that he knew about the change of plea colloquy that he knew Collazo was carrying a weapon (Guilty Plea colloquy pp. 48-49). There was no need for an evidentiary hearing on whether Padilla admitted in the plea colloquy that he knew about the weapon. The transcript established that he did so under oath. To have this knowledge considered at sentencing did not require proof that he used or actually possessed the gun. The court is not limited to elements of the crime of conviction in considering conduct relevant to sentencing. In view of the admission under oath that he knew about the gun, the court could take the knowing presence of the gun into consideration.

Using the knowing presence of the gun to enhance the offense level is not prejudicial where the court's grant of a § 5K1.1 motion for downward departure renders the guideline enhancement, in effect, immaterial. In the circumstances of this particular case, had the offense level been lower, the downward departure would have been less. There is no reasonable basis to believe that the court's sentence would have been different even if Padilla did not know Collazo had a gun.

Padilla's sentence was fair and appropriate. There was no ineffective assistance of counsel. The motion will be denied without an evidentiary hearing.